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Recent Important Decisions

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BANKRUPTCY—DISCHARGEABILITY OF TORT JUDGMENT.—Plaintiff recovered judgment against X for damages caused by X's negligent operation of his automobile. Afterwards X obtained a discharge in bankruptcy. *Held*, that the judgment was thereby discharged. *Jefferson Transfer Co.* v. *Hull*, (Wis. 1918), 166 N. W. 1.

§ 17a of the BANKRUPTCY ACT recites that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for * * * willful and malicious injuries to the person or property of another * * *" § 63a (1) includes among provable debts "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition." The remaining clauses of § 63a refer to costs and provable debts reduced to judgments after the filing of the petition and to debts which are "(4) founded upon an open account, or upon a contract express or implied." Reading the two sections together, as we must, it seems that the statute prescribes a double requirement for the discharge of a specific liability: first, it must be "provable"; second, it must be outside the exceptions enumerated in § 17a. *Friend* v. *Talcott*, 228 U. S. 27. The enumeration of certain non-dischargeable tort liabilities presupposes that some other tort liabilities may be discharged. *In re New York Tunnel Co.*, 159 Fed. 688. This squares with the older cases holding that liquidation of a tort claim by judgment makes the claim provable. *Comstock* v. *Grout*, 17 Vt. 512; *In re Comstock*, 22 Vt. 642; *Ellis* v. *Ham*, 28 Me. 385; *Crouch* v. *Gridley*, 6 Hill (N. Y.) 250; *Kellogg* v. *Schuyler*, 2 Denio (N. Y. 73; *Blake* v. *Bigelow*, 5 Ga. 437; *Howland* v. *Carson*, 16 N. B. R. 372. Whatever the reason, all the cases agree with the principal case in allowing the discharge of a tort judgment unless the liability falls within the exceptions of § 17a. *In re Lorde*, 144 Fed. 320; *U. S. ex rel. Kelley* v. *Peters*, 166 Fed. 613, 177 Fed. 885, 217 U. S. 606; *In re Walrath*, 175 Fed. 243; *In re Wakefield*, 207 Fed. 180; *In re Berlin &c. Co.*, 225 Fed. 683, affirmed *sub. nom. Moore* v. *Douglas*, 230 Fed. 399; *McClellan* v. *Schmidt*, 235 Fed. 986; *Johnston* v. *Bruckheimer*, 133 App. Div. (N. Y.) 649; *Thompkins* v. *Williams*, 137 App. Div. (N. Y.) 521, 206 N. Y. 744; *In re Grout*, 88 Ver. 318; BLACK, BANKR. § 741; BRANDENBURG, BANKR. § 1560.; COLLIER, BANKR. (11th), 436; REMINGTON, BANKR., § 680. The opposing view would make no distinction in this regard between liquidated and unliquidated tort liabilities. LOVELAND, BANKR. § 296, 20 CASE AND COMMENT 591. Decisive cases hold unliquidated tort claims non-provable, and their reasoning would generally include tort judgments as well. *Brown* v. *United Button Co.*, 149 Fed. 48; 7 COL. L. REV. 360; 20 HARV. L. REV. 646; 9 MICH. L. REV. 499; *Eberlein* v. *Fidelity & Dep. Co.*, 164 Wis. 242. § 63 has been considered as referring only to contractual or quasi-contractual claims. Moreover, the rendition of a judgment does not generally change the nature of the obligation.. *Boynton* v. *Ball*, 121 U. S. 457; 15 COL. L. REV. 543;

Woehrle v. *Canclini,* 158 Cal. 107. As the latest expression of the legislature, § 63 would ordinarily control if it clearly excludes tort judgments from being proved. *U. S.* v. *Jackson,* 143 Fed. 783.

BILLS AND NOTES—BONA FIDE HOLDER—INTERDEPENDENT AGREEMENTS.—Plaintiff gave his notes to a land company under a contract that in consideration of the payment of the notes, the payee should convey certain land and on the date of the last payment, plaintiff should have a warranty deed. The payee indorsed the notes to the defendant before maturity for value. Defendant also took an assignment of the land contract for security. On the maturity of the first note, plaintiff tendered payment asking for a conveyance. As the land company had become insolvent and had never owned the land, a conveyance could not be made; thereupon plaintiff deposited the money in defendant bank upon an agreement that plaintiff might withdraw it when he saw fit. When plaintiff sought to withdraw it, defendant claimed the amount of the notes. *Held,* that the plaintiff was not liable on the notes. *Todd* v. *State Bank of Edgewood,* (Ia. 1917), 165 N. W. 593.

The case seems on its face to be well within the doctrine of *McNight* v. *Parsons,* 136 Ia. 390, to the effect that knowledge by the purchaser of a negotiable instrument that it was given in consideration of an executory contract will not affect his rights as a *bona fide* holder unless he also had notice of a breach of such contract. *Russ Lumber &c. Co.* v. *Land &c. Co.,* 120 Cal. 521; *Bank of Sampson* v. *Hatcher,* 151 N. C. 359; *U. S. Nat. Bank* v. *Floss,* 38 Ore. 68. But the court in the principal case applies the rule that the purchaser who knows that the performance of an executory agreement is a condition precedent to the right of the payee to demand or recover payment is in no better position than the payee. *Thomas* v. *Page,* Fed. Cas. No. 13906; *Sutton* v. *Beckwith,* 68 Mich. 303. This modifies the *McKnight* case, *supra,* for that pays no attention to the kind of executory contract the purchaser might know of. Though the distinction between notice of an executory contract and notice of the existence of mutually dependent agreements had been pointed out, the cases ignored it. *Jennings* v. *Todd,* 118 Mo. 296; 7 HARV. L. REV. 431. Even the *Sutton* case, *supra,* the opinion of which supports the instant case, may be distinguished on the facts because the purchaser was there charged with knowledge of the actual fraud of the payee.

BROKERS—AUTHORITY IN WRITING—SUFFICIENCY IN DESCRIPTION OF LAND.—Defendant in writing authorized plaintiff to sell property describing it as "my stock ranch located in sections 9, 17, and 21, Township 3 South, Range 13 East, Sweetgrass County, Mont." Plaintiff sued for commissions earned under the contract. *Held,* contract unenforcible for want of sufficient description, the Code requiring agreements authorizing brokers to sell real estate to be in writing and signed by party to be charged therewith. *Rogers* v. *Lippy et ux.,* (Wash., 1918), 169 Pac. 858.

The majority opinion finds its support in the case of *Thompson* v. *English,* 76 Wash 23. It was suggested in the principal case that if the problem were a new one in the state, a different conclusion might be reached from that

reached in *Thompson* v. *English* and the decisions following the law there announced. In assuming that it was necessary to add something to the description contained in the contract, in order to make it complete, the case seems to proceed on a wrong conception of the question involved. Parol evidence may be resorted to for purpose of identifying the description contained in the writing with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated and supplying a description thereof which they omitted from the writing. *Thompson* v. *English* (*supra*). In *Guyer* v. *Warren*, 175 Ill. 328, a description of the property in an option contract as our farm in Le Claires Reserve, Rock Island County, was held sufficient within the rule that "that is certain which can be made certain from the words employed." The description in *Guyer* v. *Warren* (*supra*) is no more definite on its face than the description in the principal case, the rule laid down in the one is the same in substance as the rule laid down in the other, and yet an entirely opposite conclusion was reached as to the effect of the writing. Such a difference can be explained only on the theory that the maxim "that is certain which can be made more certain" is not applicable to cases of this character. The doctrine of the principal case is followed only in Washington. The rule of *Guyer* v. *Warren* (*supra*) finds support in many states. See *Sanchez* v. *Yorba*, 8 Cal. App. 490; *Hurley* v. *Brown*, 98 *Mass.* 545; *Hodges* v. *Kowing*, 58 Conn. 12; *Mead* v. *Parker*, 115 Mass. 413; *Robeson* v. *Hornbaker*, 3 N. J. Eq. 60.

CARRIERS OF PASSENGERS—CREATION OF THE RELATION.—Plaintiff's husband being sick, she desired to go to a nearby town where she could arrange to send him to a hospital. The fast train of the defendant did not ordinarily stop. The ticket agent wired the facts to the division superintendent who gave orders for the train to stop, but it failed to do so. In an action for damages, *held*, that the relation of passenger and carrier has been created, *Fenton et ux.* v. *Chicago, M. & St. P. Ry. Co.*, (Wash. 1918), 169 Pac. 863.

Defendant claimed that it owed no public duty to stop its train and that its promise to do so was a mere gratuity which did not create the relation of passenger and carrier. The court held that on whatever terms the common carrier receives and carries a person the relation of carrier and passenger exists, citing *Walther* v. *Southern Pac. Co.* 150 Cal. 769. The essentials of the relation are an offer by the person to become a passenger and the acceptance of such person, either expressly or impliedly, as a passenger, *Illinois Cent. Ry. Co.* v. *O'Keefe*, 168 Ill. 115; *Webster* v. *Fitchburg Ry. Co.*, 161 Mass. 298; GODDARD, BAILMENTS AND CARRIERS, 145; HUTCHINSON ON CARRIERS, (3rd Ed.), 1148. A common carrier of passengers is bound to accept all persons who properly present themselves, but may accept persons as passengers when it is not bound to do so, and when it does so accept them the relation is established, *Peason* v. *Duane*, 4 Wall (U. S.) 605; *Hannibal &c Ry. Co.* v. *Swift*, 12 Wall (U. S.) 262. So where the carrier ran a stage coach to the depot, one taking passage thereon to the depot was a passenger though he had not as yet bought a ticket. *Buffett* v. *Troy & B. Ry. Co.*, 40 N. Y. 168. Passive acquiescence in allowing persons to get on at unusual

and dangerous places does not make one standing in such place a passenger, *Youngerman* v. *New York, N. H. & H. Ry. Co.*, 223 Mass. 29. But one who gets on a train at an unusual place will be deemed a passenger after safely entering the car, *Dewire* v. *Boston & M. Ry.*, 148 Mass 343. It is not within the authority of all agents to accept as passengers persons who present themselves. The permission of the engineer will not make one a passenger, *Grimshaw* v. *Lake Shore & M. S. Ry.*, 205 N. Y. 371, nor of the baggage man, *Reary* v. *Louisville, N. O. & T. Ry.*, 40 La. Ann. 32, nor of the brakeman, *Candiff* v. *Louisville, N. O. & T. Ry.*, 42 La. Ann. 477. A yardmaster, not acting in the course of employment, cannot accept persons as passengers, *Chi. St. P. &c. Ry.* v. *Bryant*, 65 Fed. 969. In the absence of a rule of practice to the contrary the freight conductor is not entitled to accept persons for carriage, *A. T. & S. F. Ry.* v. *Johnson*, 3 Okl. 41; *Bergan* v. *Cent. Ver. Ry. Co.*, 82 Conn. 574; *Neice* v. *Chi. & A. R. R. Co.*, 254 Ill. 595. But if an emergency arises, he may do so, *Vandalia R. Co.* v. *Darby*, 60 Ind. App. 294. It is within the apparent authority of passenger conductors to accept persons as passengers, *Fitzgibbon* v. *Chi. & N. W. Ry. Co.*, 108 Ia. 614; *Mo. K. & T. Ry.* v. *Pope*, (Tex. Civ. App., 1912), 149 S. W. 1185. The ticket agent has authority to make a contract for carriage, *Kan. Pac. Co.* v. *Kessler*, 18 Kan. 523; *Houston. E. & W. T. Ry. Co.* v. *Jackson*, (Tex. Civ. App., 1901), 61 S. W. 440. Where the president of one road was riding in the engine on the invitation of the president of the defendant road, the relation was created, *The Phil. & R .Ry. Co.* v. *Derby*, 14 Howard 468. The instant case holds that the division superintendent may create the relation of passenger and carrier by special contract.

CHARITIES—PURPOSES OF GIFT—ERECTION OF MEMORIAL.—A testator bequeathed his residuary estate to his executor to be devoted to the construction of an ornamental arch or gate with some suitable or simple inscription thereon, as a memorial to his wife and himself, at some suitable part of Civic Center, a park of Denver, Col., designed for public convenience and to promote civic beauty and civic pride. *Held*, that the will created a valid charitable trust. *Haggin* v. *International Trust Co.* (Col. 1917), 169 Pac. 138.

According to the general rule, the existence of a definite beneficiary, capable of enforcing its execution, is indispensable to the creation of a valid trust. *Morice* v. *Bishop of Durham*, 10 Ves. 521; *Adye* v. *Smith*, 44 Conn. 60; *Nichols* v. *Allen*, 130 Mass. 211; *Little* v. *Willford*, 31 Minn. 173; *Holland* v. *Alcock*, 108 N. Y. 312; *Stonestreet* v. *Doyle*, 75 Va. 356. To this general rule there are at least two well defined exceptions,—charities and monuments. See 5 HARV. L. REV. 389 and 15 HARV. L. REV. 509. It may be assumed that the trust in the instant case would have been good as a charity, if it had provided merely for the erection of an ornamental arch or monument in a public park. The question then is whether the trust is any less a charity because of the provision in the will for the inscription of the names of the testator and his wife as the donors. To hold that such provision prevented the trust from being a charity would mean that the motives of the testator should be determinative of whether or not a charity were created, for certainly the monu-

ment is not rendered less beautiful or less ornate by the inscription. Such would afford no sound or satisfactory basis for the law of charitable trusts; it would also deprive the public of the benefits of many trusts simply because of some selfish motive on the part of the testator. Indubitably, the purpose and objects of a gift in a will, and not the motives of the testator, will determine whether or not it is charitable. *Smith* v. *Walker,* 181 Pa. 109; *In re Graves,* 242 Ill. 23; *Morristown Trust Co.* v. *Morristown,* 82 N. J. Eq. 521, (*contra*). But if it were held that such a trust, as the one in the instant case, is not a charity, the question arises whether it comes within the second exception, that of monuments, and is hence valid. It seems as if the reason why it is held not a charity is an argument *per se* that is is a monument. The large number of cases, that have held trusts for the erection of a monument valid, has provided for monuments at the graves of the testators. *Adnam* v. *Cole,* 6 Beav. 353; *Detwiller* v. *Hartman,* 37 N. J. Eq. 347; *Re Frazer,* 92 N. Y. 239; *Bainbridge's App.,* 97 Pa. 482; *Fite* v. *Beasley,* 80 Tenn. 328; *Emans* v. *Hickman,* 12 Hun. 425. Though it is clear that the instant case does not come within the facts of the majority of cases relative to monuments, yet it seems just as clear that it does come within the principle enunciated by those cases. The one monument appears to be as much a part of the funeral expenses as the other, and as much a tribute to the deceased to whose memory it was erected. It was so held in *Trimmer* v. *Danby,* 24 L. J. Rep. Ch. 424 (426), where the will provided for the erection of a monument to the testator's memory in St. Paul's Cathedral. A number of cases have held that it is not necessary that the monument be erected to the testator's memory. *Masters* v. *Masters,* 1 P. Wms. 423; *Mussett* v. *Bingle,* W. N. (1876) 170; *Wood* v. *Vandenburgh,* 6 Paige 277.

COMPROMISE AND SETTLEMENT—WHAT CONSTITUTES.—Defendants admitted liability for the amount of two shipments of shoes, but denied a claim arising out of a third shipment, having countermanded their order before delivery. Upon the receipt of a statement from plaintiff which included the three items, defendants mailed him a check for the precise amount due on the two admitted claims, stating at the same time that the check was in full of account. Plaintiff accepted and cashed the check, and later brought this action for the amount due on the third shipment. Defendants pleaded an accord and satisfaction. *Held,* that as to the third item, the acceptance of the check did not amount to a compromise and settlement, and that plaintiff could only recover damages for the breach of the contract. *Krohn-Fechheimer Co.* v. *Palmer,* (Mo., 1917), 199 S. W. 763.

The rule that acceptance of a less sum than is actually due will not operate to extinguish the whole debt, although agreed by the creditor to be received on such condition, is well established by the great weight of authority. BISHOP, CONTRACTS, §50. Logically it is difficult to perceive any sound distinction between the above case and payment of an amount concededly due on a claim, the remainder of which is disputed. Accordingly some courts have held that in the latter event there is no binding compromise, there being no

consideration to support the agreement. *Driscoll* v. *Sullivan,* (Ind., 1917), 115 N. E. 331; *Demeules* v. *Jewel Tea Co.,* 103 Minn. 150; *Frank et al.* v. *Vogt,* 166 N. Y. Supp. 175; *Weidner* v. *Standard Life & Accident Insurance Co.,* 130 Wis. 10; *Whittaker Chain Tread Co.* v. *Standard Auto Supply Co.,* 216 Mass. 204. Other courts, treating the whole claim as unliquidated, have shown a tendency to sustain agreements in discharge of liability when any part of the claim is in dispute, and although payment is only of the smaller amount which was conceded by the debtor to be due. *Tanner* v. *Merrill,* 108 Mich. 58; *Neely* v. *Thompson,* 68 Kan. 193; *Treat* v. *Price,* 47 Neb. 875; *C. M. & St. P. Ry Co.* v. *Clark,* 178 U. S. 353. These later courts, considering the rule that payment of a less amount than is actually due will not discharge the whole debt as a rule technical in its conception and harsh in its operation, have evidently taken this opportunity to limit its application.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—CARRIAGE OF STATE OFFICIALS BY RAILROADS.—A state reserved the right to amend alter or repeal the charter of a railroad company. *Held,*—It canot by virtue of such right impose on the railroad company the burden of carrying free of charge state officials, for that works a deprivation without due proces of law of the company's right to charge such officials fare. *Napier* v. *Delware, L. & W. R. Co.,* (N. Y. 1917), 102 Atl. 444.

The decision proceded upon an assumption that the railroad company had a right to charge state officials even though the state should so amend the company's charter as to give it no such authority. By this assumption the question of the extent of the state's reserved power of amendment is eliminated. The case therefore assumes that the privilege of charging all persons was a vested right and its taking away not an act within the police power. In *Dunbar* v. *Boston & P. R. Corp.,* 181., Mass. 383, it was held that where the damage done is small and the public advantage great an interference with a vested right would be sustained. This is contrary, however, to the generally accepted view. That such a taking was not an exercise of the reserved power of the legislature but constituted a taking of property without due process of law was held in *Delaware, Lackawanna and Western R. R. Co.* v. *Board of Public Utilities Commisioners,* 85 N. J. L. 28. The same conclusion was reached in *Pa. R. R. Co.* v. *Herrmann,* 89 N. J. L. 582. The charter however in the last case did not reserve the right to alter, amend or repeal the same. The legislative act requiring a railroad to run four trains per day was held confiscatory and unconstitutional as depriving the company of property without due proces of law. *Washington, Potomac & Chesapeake Ry. Co.* v. *Magruder,* 198 Fed. 218. Laws requiring railroad companies to construct and maintain spur tracks to industrial plants work a deprivation of property without due proces of law. *McInnis* v. *New Orleans & N. E.R. Co.,* 109 Miss. 482. A state statute requiring in interstate as well as intrastate commerce separate Pullman accommodations for the white and colored races though entailing great expense in view of the almost negligible number of colored Pullman passenger is not a taking of property without due process of

law. *Southern Ry. Co.* v. *Norton,* 112 Miss. 302. An order of a state railroad commission requiring truckage connection between competing railroads for interchange of business is not due process of law, if the order is arbitrary or unreasonable and not justified by public necessity. *State of Washington* v. *Fairchild,* 224 U. S. 510..

CONSTITUTIONAL LAW—TAXATION OF FOREIGN CORPORATIONS—PRIVILEGE OF DOING DOMESTIC BUSINESS.—Under a statute requiring every foreign corporation doing business within the state to pay an annual excise tax of one one-hundredth of one per cent of the par value of its authorized capital stock, plaintiff had paid $5,500. In an action to recover the money so paid, *held,* the statute under which the tax was levied was unconstitutional, as burdening interstate commerce, and laid upon property of the corporation beyond the state, hence plaintiff should recover. *International Paper Co.* v. *Massachusetts,* U. S. Sup. Ct. Adv. Ops., March 4, 1918.

In this decision the Supreme Court reverses the supreme court of Massachusetts, 228 Mass. 101, 117 N. E. 246. The decision in the latter court is noted in 16 MICH. L. REV. 127. *Looney* v. *Crane Co.,* 245 U. S. 178, 38 Sup. Ct. 85, decided Dec. 10, 1917, was followed. The *Looney Case* was noted in 16 MICH. L. REV. 264. The controlling fact in the principal case was the lack of any maximum limit. In *Kansas City, etc. Ry.* v. *Kansas,* 240 U. S. 227, 233, Mr. Justice Hughes had said: "We have recently had occasion (*Baltic Mining Co.* v. *Massachusetts, supra*), to emphasize the necessary caution that every case involving the validity of a tax must be decided upon its own facts; and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction." Without any consideration, however, as to whether the amount of the tax was such as to constitute a burden upon plaintiff's interstate business the court in the principal case held the statute unconstitutional, on the ground that there was no maximum fixed. Those who have been inclined to a feeling of dizziness in following the rulings of the Supreme Court on this subject can gain some comfort from Mr. Justice Vandevanter's opinion when he says: "In disposing of these questions there has been at times some diversity of opinion among the members of the court and some of the decisions have not been in full accord with others."

CONSTITUTIONAL LAW—TRADING STAMP STATUTES.—The complainant companies sought to restrain the defendants from enforcing the provisions of the statute prohibiting the exercise of the trading stamp and coupon business in that state, on the ground that the statute was unconstitutional. *Held,* constitutional. *Sperry & Hutchinson Co.* v. *Wiegle,* (Wis. 1918), 166 N. W. 54.

The case settles the law of Wisconsin in accord with the present trend of the authorities. The authorities are collected in 16 MICH. L. REV. 263.

CORPORATIONS—"PRACTICING LAW"—WHAT CONSTITUTES.—The defendant trust company advertised that making a will without legal advice was hazardous, and offered its services; and, when consulted, provided an attorney, employed by its own attorneys. *Held,* that defendant had violated PENAL LAW (CONSOL. LAWS, c. 40) sec. 280, making it unlawful for a corporation to render or furnish legal advice, to furnish attorneys or counsel in any other manner, to assume to be entitled to practice law, or to furnish legal advice, or to advertise that either alone or together with, or by, or through any person, whether duly and regularly admitted attorney at law or not, it has, owns, conducts, or maintains a law office, or an office for the practice of law, or for furnishing legal advice, services, or counsel. *People* v. *People's Trust Co.,* 167 N. Y. S. 767.

The practice of law by a corporation is both *malum in se* and *malum prohibitum,* according to the law of the state of New York. That a corporation can neither practice law, nor hire lawyers to carry on the business of practicing law for it; and that, for a corporation to do so, is *malum in se,* and contrary to public policy, was the holding of the court in *Matter of Co-operative Law Co.,* 198 N. Y. S. 479. Section 280 of the PENAL LAW of New York, above referred to, declares that any corporation which practices law or hires lawyers to carry on the business of practicing law, shall be liable to a fine. Just what constitutes "practicing law" by a corporation has been the subject of litigation in the New York courts several times previous to the instant case. A realty corporation retained and employed by a lessee of premises to furnish "legal and other expert services" in a proceeding connected with the condemnation of the lessee's interests to a public use, under an agreement that it was to be paid 33⅓ per cent of the award, was held to be practicing law, in *In Re Certain Lands in City of New York,* 128 N. Y. S. 999. A corporation which contracted with third persons to prosecute legal proceedings on their behalf, and retained an attorney to conduct the litigations, paying him money for incidental expenses, was held to be practicing law, in *U. S. Title Guaranty Co.* v. *Brown,* 149 N. Y. S. 186; affirmed in 152 N. Y. S., 470; affirmed in 217 N. Y. 628. A Delaware corporation which maintained an office in New York City, and distributed circulars to attorneys at law, offering either to incorporate companies under the laws of Delaware or to furnish all the necessary forms, etc., for the attorneys to do so themselves; and which, through certain New York attorneys, who acted as forwarders to the home office in Delaware, actually incorporated three companies, was held to be practicing law, in *In Re Pace et al.,* 156 N. Y. S. 641. Where a corporation, formed to secure reductions of assessments, employed and retained an attorney to conduct proceedings to obtain the reduction of a third party's assessment, and the attorney sued out a writ of *certiorari* to review the action of the tax board in refusing a reduction of assessment, such corporation was held to be practicing law, *People* v. *Purdy et al,* 162 N. Y. S. 56 and 162 N. Y. S. 70. In the instant case, the court held that the practice of law was not confined to performing services in an action or proceeding pending in courts of justice, but includes the drafting and supervising of wills; and, consequently, that the defendant had violated the statute.

COVENANTS—BUILDING RESTRICTIONS — RIGHT TO BENEFIT. — Complainant and defendant were owners of adjoining lots platted and sold with restrictions in the deed of each grantee. The restrictions were to the effect that dwellings built on lots should have at least six rooms and be placed twenty-four feet from the street line. Defendant, who took without notice that the restrictions were imposed for the benefit of other lots, built a combined business and dwelling block up to the sidewalk. In an action to enforce observance of the restrictions, *held*, complainant not entitled to the benefit of the restrictions, and defendant's building did not amount to a violation thereof. *Kiley* v. *Hall*, (Ohio, 1917), 117 N. E. 359.

In an action to enforce building restrictions, it is important to show, not only that the defendant is bound thereby, but also that the plaintiff is entitled to sue. Whether the restrictions are for the benefit of the vendor, or are meant by him and understood by the purchasers to be for the common advantage of them, is a question of fact, JOLLY, RESTRICTIVE COVENANTS AFFECTING LAND, p. 57. Knowledge of the effect of the restrictions may be important in deciding whether one party is bound and the other has the right to sue, *Renals* v. *Cowlishaw*, 9 Ch. Div. 125; 11 Ch. Div. 866. The knowledge or notice to the parties may be actual and found in the immediate deed in express terms of mutuality, *Henderson* v. *Champion*, 83 N. J. Eq. 554. If it settled that the restriction was for the benefit of a particular piece of land, then, although there is no mention of the restriction in the immediate deed, the right to assert such benefit may pass by a conveyance of the land and "appurtenances", *Hartt* v. *Rueter*, 223 Mass. 207. The same result should be reached without the word "appurtenances". The intention of the vendor that the restrictions were for the benefit of the several grantees may be inferred from statements made at a public auction, *Nottingham Patent Brick & Tile Co.* v. *Butler*, 16 Q. B. D. 778, JOLLY, RESTRICTIVE COVENANTS AFFECTING LAND, p. 57. The most common method of imposing building restrictions upon the land for the benefit of subsequent purchasers is by a general building scheme, *Wiegman* v. *Kusel*, 270 Ill. 520. The proof of the general plan must, however, be clear. Contiguous lots conveyed with various restrictions and some without restrictions may defeat proof of a general plan. *St. Patrick's Religious &c. Ass'n.* v. *Hale*, (Mass. 1917), 116 N. E. 407. It must be clear either from the language of the deeds or from circumstances that there is a general plan, *Dana* v. *Wentworth*, 111 Mass. 291. If the general plan becomes abortive, it is a circumstance tending to show that the restriction was not intended for the benefit of the other lots, *Coughlin* v. *Barker*, 46 Mo. App. 54, 66. If the restrictions on the platted land are in the chain of title of both complainant and defendant, complainant is entitled to enforce the restrictions, *Hartwig et al.* v. *Grace Hospital*, (Mich. 1917), 165 N. W. 827. The better view, however, is the contrary one. See 14 MICH. L. REV. 685.

DEDICATION—ACCEPTANCE—WHAT CONSTITUTES.—P sued under a Street Closing Act to recover compensation for the closing of a street which he claimed had been dedicated to the public, an acceptance of said street being

implied from a general public user for ten years and the construction thereon by various public officials of gas mains, sewers, street lamps, signposts, and an ash sidewalk. *Held,* that these things were insufficient to show its acceptance as a public street by the city. *In re Wallace, Barnes, and Matthews Aves.,* (N. Y., 1917), 118 N. E. 506.

In order to create a valid common law dedication all the authorities agree that there must be, first, an intention to dedicate and, second, an acceptance by the public. See ELLIOTT, ROADS AND STREETS, Secs. 124, 150; ANGELL, HIGHWAYS, Secs. 142, 157; TIFFANY, REAL PROPERTY, Secs. 422, 423. Assuming the sufficiency of the intention to dedicate, the question arises as to what shall constitute a valid acceptance. Most courts would hold that the nature of the requisite acceptance is dependent on whether it is the dedicator or the municipality that is sought to be charged. Thus, in order to bind the grantor it is sufficient in most jurisdictions if there has been a substantial public user for the purposes of the dedication. *Cassidy* v. *Sullivan,* 75 Neb. 847; *Atty. Gen.* v. *Abbott,* 154 Mass. 323; *Downend* v. *Kansas City,* 156 Mo. 60; *Alden Coal Co.* v. *Challis,* 200 Ill. 222; *Green* v. *Elliott,* 86 Ind. 53; *Reg.* v. *Petrie,* 30 Eng. Law and Eq. 207; *Carter* v. *City of Portland,* 4 Ore. 339; *Briel* v. *City of Natchez,* 48 Miss. 423; *Crump* v. *Minis,* 64 N. C. 767; TIFFANY, REAL PROPERTY, p. 978. But in some jurisdictions it seems that user alone will not even bind him. *Speir* v. *Town of New Utrecht,* 121 N. Y. 420; *White* v. *Bradley,* 66 Me. 254. In *Terry* v. *McClung,* 104 Va. 599, it was held that a road dedicated to the public must be accepted by the county court on its records before it can be a public road; in some states it is held that the acceptance must be by the city council. *Schuster* v. *Barber Asphalt Paving Co.,* 24 Ky. Rep. 2346; *Brewer* v. *Pine Bluff,* 80 Ark. 489. According to what seems to represent the weight of authority, user alone does not constitute an adequate acceptance when the municipality is the party sought to be charged. *Downing* v. *Coatesville Borough,* 214 Pa. 291; *Downend* v. *Kansas City, supra; Smith* v. *Smythe,* 197 N. Y. 457. But, to the effect that user alone will constitute such an acceptance as will bind the municipality see ELLIOTT, ROADS AND STREETS, p. 163; *King* v. *Leake,* 5 B. & Ad. 469, (1833), but this was changed by the HIGHWAY ACT of 1835; *Green* v. *Town of Canaan,* 29 Conn. 157; *Hobbs* v. *Inhabitants of Lowell,* 19 Pick. 405; *Town of Fowler* v. *Linquist,* 138 Ind. 566, (*semble*); *City of Hammond* v. *Maher,* 30 Ind. App. 286. In the last case the court said: "The evidence does not show that the appellant had formally accepted it, or that it had ever caused it to be worked as a street, but under the authorities this is not necessary". But even in most of the jurisdictions that deem user alone insufficient to show an acceptance on the part of the public so as to bind the city, it would be held that an acceptance by the public need not be by a formal act of the public authorities, but may be implied from the latter's improving or repairing the same, or from any other act with respect to the subject matter which indicates an assumption of jurisdiction and dominion over the same. *Arnold* v. *City of Orange,* 73 N. J. Eq. 280; *Hall* v. *Breyfogle,* 162 Ind. 494 (500); *Chapman* v. *City of Sault Ste. Marie,* 146 Mich.

23; *Folsom* v. *Town of Underhill,* 36 Vt. 580. But, that these repairs must have been made by the city officials who have authority to accept and lay out streets, see *Ogle* v. *City of Cumberland,* 90 Md. 59; *People* v. *Underhill,* 144 N. Y. 316; *State of Maine* v. *Bradbury,* 40 Me. 154; *Reed* v. *Inhabitants of Scituate,* 5 Allen 120. It is on the principle enunciated in these last cases that the instant case seems to have been decided, since in that case it does not appear that the improvements were made by the direction or authority of the highway commissioners.

HOSPITALS—LIABILITY FOR SERVANT'S TORTS—LIABILITY FOR VIOLATION OF CONTRACTUAL DUTY.—Defendant was owner of a private hospital and contracted with the plaintiff to furnish her with a room, nurses' care, and the use of the operating room for an operation for which ether was to be administered. While under the influence of the anæsthetic the plaintiff was robbed of a valuable ring and the evidence tended to show that it was stolen by one of the nurses. No negligence on defendant's part was shown. *Held,* that though defendant was not negligent, and though the nurse, in stealing the ring, was not acting within the course of her employment, yet defendant was liable for the breach of his contractual duty to afford her protection, whether from employees or strangers. *Vannah* v. *Hart Private Hospital,* (Mass., 1917), 117 N. E. 328.

A master is liable for the neligent or even malicious torts of his servants so long as they are within the course of his employment as furthering, however remotely, the master's business, *Holler* v. *Ross,* 68 N. J. L. 324; and in some instances a master is liable for his servants' acts without the course of his employment, if they result in injury to those to whom the master owes a special duty of hospitality or protection. The most striking example of this is of course the liability of the common carrier. A steamboat company is liable for an assault on a passenger by a waiter employed in the lunchroom, *Bryant* v. *Rich,* 106 Mass. 180, and a railroad company for a brakeman's abuse of a passenger according to *Goddard* v. *Grand Trunk,* 57 Me. 202; and so is a sleeping car company for an attack by a porter on the occupier of a berth, *Nevin* v. *Pullman Palace Car Co.,* 106 Ill. 222. Although at first there was some conflict of authorities, the weight of recent decisions seems to be in favor of accepting the doctrine announced in the *Goddard Case, supra,* that the liability of a carrier is almost that of an insurer. But this exceptional liability has been ascribed to others who invite guests upon their premises, thereby impliedly warranting to them courteous treatment and personal safety. The same principle applies to innkeepers and theatre-proprietors in England almost without question, cf. 16 MICH. L. REV. 202; in the United States with less unanimity, but yet in a goodly array of authorities; *Overstreet* v. *Moser,* 88 Mo. App. 72; *Rommel* v. *Schambacher,* 120 Pa. 579; *Dickson* v. *Waldron,* 135 Ind. 507; and finally in the vexed case of *Clancy* v. *Barker,* (Neb.), 98 N. W. 440; though the same facts resulted in a contrary verdict, by a divided court, in 131 Fed. 161, on the theory that this extra liability applies only to carriers because of the extra hazard incidental to the service they offer. If the implied warranty contained in an

offer of and contract for service includes within itself a guarantee of protection and immunity from injury while enjoying said services, when the service is to be performed by a carrier, innkeeper, or theatrical manager, certainly the extension of that doctrine to include hospitals, the very essence of whose service is protection to the weak, is a logical development of the same idea.

INDICTMENT AND INFORMATION—AMENDMENT—ALLEGATION AS TO TIME.—Where an indictment charged the commission of an offense at an impossible date, to-wit, a date subsequent to that on which the indictment was found, *held,* that the indictment is defective in substance and can not be amended by the court. *People* v. *Van Every* (N. Y., 1917), 118 N. E. 244.

Substantial parts of an indictment are always drawn and presented by a grand jury and, if defective, must be amended by the grand jury because the indictment in its substantial parts must be solely the work of a grand jury. *Ex parte Bain,* 121 U. S. 1; *Hawthorn* v. *State of Maryland,* 56 Md. 530; *Patrick* v. *People of State of Illinois,* 132 Ill. 529; *State* v. *Squire,* 10 N. H. 558. Formal parts of an indictment, such as a formal conclusion, like "against the peace and dignity of the state", are inserted by a court without the concurrence of a grand jury because these parts were not originally the work of a grand jury. *Cain* v. *The State,* 4 Blackf. (Ind.) 512; *Hite* v. *The State,* 9 Yerg. (Tenn.) 198. An allegation of the date at which the offense was committed is, as the instant case holds, emphatically a substantial part of the indictment. *Sanders* v. *The State,* 26 Tex. 120; *Dickson* v. *State of Florida,* 20 Fla. 800; *State* v. *Sexton,* 3 Hawks (N. Car.) 184. Because informations, unlike indictments, are not the work of a grand jury they may be amended, with the court's consent, by the public officer, or officer of the crown, by whom they are presented. *Rex* v. *Wilkes,* 4 Burr. 2527; *Daxanbeklar* v. *The People,* 93 Ill. A. 553; *Long* v. *People of State of Illinois,* 135 Ill. 435.

INSURANCE — ACCIDENT INSURANCE — DEATH BY SUBMARINE — EXTERNAL, VIOLENT AND ACCIDENTAL MEANS.—An accident policy excepted from liability loss under any circumstances from firearms or explosives. The holder of such a policy was a passenger on the steamer Arabic which was sunk off the coast of Ireland. *Held,* the torpedoing of the vessel was not the direct cause of the death of insured where the facts tended to show that death arose from drawning. *Woods* v. *Standard Acc. Ins. Co. of Detroit,* (Wis., 1918), 166 N. W. 20.

The insuring clause of the policy provided that it insured the holder against bodily injuries effected solely by external, violent and accidental means, with the further provision that no benefits would be paid for injuries from firearms or explosives. There is no doubt but that if drowning was the proximate cause of the death that it is within the terms of the policy. *De Van* v. *Commercial Travelers' Mut. Acc. Ass'n of America,* 157 N. Y. 690. The question involved in this case is clearly that of proximate cause. Had the deceased been standing on some part of the ship where he would

have been blown into the sea and immediately drowned, his death would clearly be within the terms of the policy. The fact that he fastened a life preserver upon himself and got into a boat did not take away the danger of losing his life but only lessened it. Just when the intervention of a voluntary act under the stress of circumstances, as appear in this case will break the chain of causation is a mixed question of law and fact. If it is such that it becomes the active, efficient, producing cause of which the death is a natural and probable consequence in view of the existing circumstances and conditions, the law will stop there and not go back farther in the line of causation. It is not easy, however, to reconcile all the cases on this subject. Recovery can be had on an accident policy where the injury caused rheumatism which resulted in death. *Travelers' Ins. Co.* v. *Hunter,* 30 Tex. Civ. App. 489. The sting of an insect is the proximate cause of death resulting from blood poisoning caused by the sting. *Omberg* v. *U. S. Mut. Acc. Ass'n.,* 101 Ky. 303. Where one holding an accident policy falls from a window in delirium, the delirium is the proximate cause of the injury. *Carr* v. *Pac. Mut. Life Ins. Co.,* 100 Mo. App. 602. Under a policy insuring against accidental injuries the insurer is liable for the death of the insured resulting from an operation rendered necessary by an accidental rupture *Collins* v. *Casualty Co. of America,* 224 Mass. 327. Cases like the instant one are no doubt justifiable on the ground that the insurer prepares his own contract and therefore it should be construed most strongly against him.

INSURANCE—ACCIDENT POLICY—SUNSTROKE—"ACCIDENTAL MEANS."—An insurance policy indemnified "against bodily injury (herein called such injury) sustained solely through accidental means," and provided that a sunstroke "shall be deemed to be included in said term 'such injury'". Assured while engaged in the performance of his duties as traffic policeman suffered a sunstroke. *Held,* assured is entitled to recover on the policy. *Higgins* v. *Midland Casualty Co.,* (Ill., 1917), 118 N. E. 11.

The present case raises the question whether a sunstroke suffered by a person while engaged in his usual occupation under normal circumstances constitutes a "bodily injury" through "accidental means." It is well settled that an injury which is the natural and probable consequence of an act or course of action voluntarily undertaken by the assured is not an injury by "accidental means." *Hutton* v. *States Accident Insur. Co.,* 267 Ill. 267; *Taliaferro* v. *Travellers' Protect. Assoc. of America,* 80 Fed. 368; *Fidelity & Casualty Co. of N. Y.* v. *Stacey's Ex'rs.,* 143 Fed. 271. The question of the instant case has so far been adjudicated by only a few cases. Along with the instant case, the case of *Bryant* v. *Continental Casualty Co.,* 107 Tex. 582; *Pack* v. *Prudential Casualty Co.,* 170 Ky. 47, and *Gallagher* v. *Fidelity & Casualty Co. of N. Y.,* 148 N. Y. S. 1016, have determined that a sunstroke under the circumstances of the instant case is an injury through "accidental means." A diligent search has revealed only two cases which decide the contrary. *Semancik* v. *Continental Casualty Co.,* 56 Pa. Sup. 392, and *Elsey* v. *Fidelity & Casualty Co. of N. Y.,* (Ind. App. 1915), 109 N. E. 413. Neither case was decided in a court of final jurisdiction and the de-

cision in each case was based largely on the same three cases, to-wit, *Bryant* v.*Continental Casualty Co., supra; Dozier* v. *Fidelity & Casualty Co. of N. Y.*, 46 Fed. 446; *Sinclair* v. *The Maritime Passengers' Assurance Co.*, 3 El. & El. 478. The first of these cases, decided in 1912 in the Civil Court of Appeals of Texas, 145 S. W. 636, has since been reversed in the Texas Supreme Court, 107 Tex. 582. The policies on which suit was brought in the *Dozier* and *Sinclair Cases, supra,* provided against *bodily or personal* injuries through "accidental means," and did not provide for sunstroke. Therefore, the decision in those cases that no recovery could be had where the injury or death resulted from sunstroke is proper and unavoidable, since admittedly a sunstroke is not a bodily or personal injury in the ordinary sense. Probably as a result of these cases a provision, like that of the instant case, that sunstroke through "accidental means" shall be deemed a bodily injury was inserted in insurance policies. The cases of *Semancik* v. *Contin. Cas. Co.* and *Elsey* v. *Fid. & Cas. Co. of N. Y., ante,* seem to be unsupported by authority. The instant case holds that a sunstroke under the circumstances of this case is an unusual, unexpected event, so that it can not be deemed a natural and probable consequence of assured's self-exposure to the sun.

INSURANCE — HEALTH AND ACCIDENT — LIABILITY. — Plaintiff sued on a health insurance policy which was conditioned on the disability of the assured "from performing any and every kind of duty pertaining to his occupation," during which disability the assured shall be "necessarily confined to the house." During all but two days of the period for which sickness indemnity was claimed, plaintiff, after visiting his doctor, at whose office it was necessary to call on account of the nature of the treatment, walked to his law office, where he usually remained only fifteen or twenty minutes, and transacted a little of his business. *Held,* the visits to the law office constituted a breach of condition of necessary confinement. *Pirscher* v. *Casualty Co. of America,* (Md. 1917), 102 Atl. 546.

All courts construe an insurance policy against the insurer when the terms are at all uncertain or ambiguous. *Rocci* v. *Mass. Accident Co.*, 222 Mass. 336; *Turner* v. *Fidelity & Casualty Co. of N. Y.*, 112 Mich. 425. The terms in the policy in the instant case providing for necessary confinement and total disability as conditions for recovery are uncertain and therefore open to interpretation. Instances of literal interpretation of the condition of necessary confinement are: *Cooper* v. *Phoenix Accident & Sick Benefit Association,* 141 Mich. 478, holding that the assured was not "necessarily confined" when he had visited his doctor and on the doctor's advice had taken walks for his health; *Schneps* v. *Fidelity & Casualty Co. of N. Y.*, 101, N. Y. S. 106, holding that the presence of the assured in New York City and in the mountains for cure was a breach of the condition of necessary confinement; *Bradshaw* v. *American Benevolent Association,* 112 Mo. App. 435, holding that one was not necessarily confined who on one occasion went to a doctor outside of the city and on another occasion took a ten days' trip for his health; *Rocci* v. *Mass. Accident Co.*, 222 Mass. 336, holding that a change

from one hospital or house to another at intervals of two or three weeks was not necessary confinement. There is a relaxation from this literal and strict position in *Mutual Benefit Association* v. *Nancarrow,* 18 Col. App. 274; *Dulany* v. *Fidelity & Casualty Co. of N. Y.,* 106 Md. 17; *Scales* v. *Masonic Protective Association,* 70 N. H. 490, where the taking of outdoor exercise, on a doctor's advice, was deemed consistent with a "necessary confinement" condition. A very liberal interpretation is seen in *Hoffman* v. *Michigan Home & Hospital Association,* 128 Mich. 323 (2 of the 5 judges dissenting), viz., that visits to a doctor, walks on his advice, visits away for a change of scenery, do not constitute a breach of this condition. The total disability clause in health policies, such as that in the instant case, which the court did not pass upon, also receives interpretations both literal and liberal. Literal interpretations are seen in *Saveland* v. *Fidelity & Casualty Co. of N. Y.,* 67 Wis. 174; *Lyon* v. *Railway Passenger Assur. Co.,* 46 Ia. 631. However, by weight of authority, a liberal interpretation is adopted, viz., that a total disability clause is satisfied if the assured is unable, in a substantial and material sense, to do his usual business in substantially the usual way. *Young* v. *Travellers' Ins. Co.,* 80 Me. 244; *Turner* v. *Fidelity & Casualty Co. of N. Y.,* 112 Mich. 425; *Neafie* v. *Manufacturers' Accid. Indemnity Co.,* 8 N. Y. S. 202; *Lobdill* v. *Laboringmen's Mut. Aid Assoc. of Chatfield,* 69 Minn. 14; *Mut. Benefit Assoc.* v. *Nancarrow,* 18 Col. App. 274. The courts in the minority in holding to a literal interpretation of this clause suggest that the assured should refuse the total disability policy and demand a partial disability policy. Under this literal interpretation the circumstances of the instant case would not constitute total disability inasmuch as the plaintiff was able to go to his office each day for a short time. Almost certainly this would not be the view of courts adopting the liberal interpretation.

LANDLORD AND TENANT—EVICTION—INTERFERENCE WITH SUB-LESSEE.—The plaintiff, the lessee of the defendant, occupied part of the premises leased and sub-let the remainder. Defendant wrote to the sub-tenants forbidding them to pay rent to the plaintiff, representing that the latter had no right to the premises, and collected the rents. Plaintiff moved out and sued for eviction. *Held,* that there was no eviction, since there was no ouster or interference with the plaintiff's beneficial use of the premises. *Aguglia* v. *Cavicchia,* (Mass., 1918), 118 N. E. 283.

The case presents the situation of an alleged eviction from part of the premises leased—that part being a reversion—and a subsequent abandonment of the portion occupied by the lessee himself. In a technical sense there can be no physical interference with incorporeal property. Recognizing this difficulty, the courts have utilized the doctrine of constructive eviction in the case of disturbances of the enjoyment of easements and reversions, and have applied the rule that, "any obstruction by the landlord to the beneficial enjoyment of the demised premises, or diminution of the consideration of the contract by the acts of the landlord, amounts to a constructive eviction." *Lewis* v. *Payn,* 4 Wend, 423. In *Lewis* v. *Payn,* a constructive eviction was found when the original landlord distrained on the premises of the sub-

lessees for rent due to the lessee; the court added that this amounted to "something more than a constructive eviction". This elaboration was probably added because an actual eviction from a reversion is impossible. In that case the eviction was from the entire reversion—the lessee was in possession of no part of the demised premises. In *Dyett* v. *Pendleton,* 8 Cow. 727, the lessee sub-let part and remained in possession of part. When the landlord committed acts amounting to a constructive eviction the sub-tenant and the lessee both moved out. It was held that the lessee was evicted from the whole of the premises including the reversion. But in that case there was actual disturbance of the lessee's quiet enjoyment of the part he himself occupied. The eviction from the reversion can be said to have been included when the lessee was evicted from his part, since an eviction from part is an eviction from the whole. The theory is that the wrong-doer will not be allowed to apportion his wrong. *Ibid,* 731; *Leishman* v. *White,* 1 Allen 489; *Lawrence* v. *French,* 25 Wend. 443. Assuming for the present that the landlord's acts in the principal case were of the quality to effect a constructive eviction from the reversion, the question arises whether this would take in the part actually occupied by the lessee and abandoned by him. It is submitted that this conclusion ought to follow, since, as indicated above, an eviction from part is an eviction from the whole. The fact that we are trying to pass from an eviction from incorporeal property to an eviction from corporeal property ought to raise no difficulties, since, as regards the landlord who is a wrong-doer, the nature of the tenant's right interfered with should be immaterial—for the reversion is equally a part of the premises demised. The writer has been unable to find any cases exactly analogous on this point. There is a dictum in *Burn* v. *Phelps,* 1 Starkie 94, where the lessee sub-let to several sub-lessees one of whom was evicted by the original landlord; Lord Ellenborough there said that the lessee might have pleaded an eviction from the whole of the premises which would have included the portion occupied by the other sub-lessees. An analogy might be drawn from those cases where an eviction from an easement is held to justify an abandonment of the remainder of the premises. *The West Side Savings Bank* v. *Newton,* 57 How. Pr. (N. Y.) 152. It is doubtful whether the court in the principal case came to the correct conclusion when it denied that the acts of the landlord amounted to a constructive eviction. The rent due to the lessee is part of the substance of the lessee's beneficial enjoyment. He should not be forced to sue his sub-tenants for rent which they would have willingly paid had it not been for the landlord's intermeddling. An eviction has been found in the following cases under facts quite similar. *Burn* v. *Phelps, supra; Lewis* v. *Payn, supra; Leadbeater* v. *Roth,* 25 Ill. 478; *Burhans* v. *Monier,* 38 App. Div. (N. Y.) 466. The court in the principal case indicates that the sub-tenants were estopped to deny their landlord's title. This is a misapplication of the doctrine of estoppel, which can operate only between the parties to a suit; it cannot bind strangers to it. *South* v. *Deaton,* 113 Ky. 312. At most there was only a potential estoppel. Since *Dyett* v. *Pendleton, supra,* the right of the tenant to defend by showing a constructive eviction

when sued for rent due him has been put on the grounds of failure of consideration due to the acts of the landlord. But this defense to the performance of a contract can not operate when the tenant himself sues. This right has been given by some courts on the theory of an implied agreement of the landlord not to interfere with the performance by the tenant. *McDowell* v. *Hyman*, 117 Cal. 67; 29 HARV. L. REV. 555; contra, *Malzy* v. *Eichholz*, [1916], L. R., 2 K. B. Div. 308. The acceptance of this view would remove the last obstacle to the tenant's right to recover in this case.

MALICIOUS PROSECUTION—JUDICIAL PROCEEDINGS TO TEST SANITY.—Under a statute authorizing a proceeding before a justice of the peace to determine whether a resident alleged to be insane was a proper subject for treatment and entitled to be maintained at the state hospital the defendant maliciously commenced action against the plaintiff. In defence to an action for malicious prosecution the defendant claimed the action to have been extra-judicial. *Held*, that the proceeding was judicial and adequate to support the action. *Treloar* v. *Harris*, (Ind., 1917), 117 N. E. 975.

The initial requirement that in order to show a good cause of action for malicious prosecution a criminal proceeding must have been instituted by the defendant has been so far cut down that some courts, as the above, will allow recovery where any judicial proceeding has been commenced. There is, however, considerable variance on this matter. It is well settled in England and America that the action will lie where criminal proceedings have been set on foot. *Elsee* v. *Smith*, 2 Chit., 304; *Dennis* v. *Ryan*, 65 N. Y. 385; *Sweet* v. *Negus*, 30 Mich. 406; also, where the suit is a civil one and involves arrest of person or attachment of property, *Harr* v. *Ward*, 73 Ark. 437; *Tomlinson and Sperry* v. *Warner*, 9 Ohio 104; *Smith* v. *Cattel*, 2 Wils. K. B. 376; or where the action results in special damage to business or reputation, viz.: proceedings to wind up a trading company, *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*, 11 Q. B. Div. 674—proceedings to declare one a bankrupt, *Chapman* v. *Pickersgill*, C. P. 2 Wils. 145; *Wilkinson* v. *Goodfellow-Brooks Shoe Co. et. al*, 141 Fed. 218—inquisition of lunacy, *Dordoni* v. *Smith*, 82 N. J. L. 525. Many courts in this country allow the action for the institution of any civil judicial proceeding, *Closson* v. *Staples*, 42 Vt. 209; *Kolka* v. *Jones*, 6 N. D. 461. The leaning seems to be in this direction, NEWELL ON MALICIOUS PROSECUTION, 32; 1 COOLEY ON TORTS, (3rd Ed.) 350. Indiana adheres to the latter view, *Coffey* v. *Myers*, 84 Ind. 105; *McCardle* v. *McGinley*, 86 Ind. 538. Even though the principal case involves a non-criminal proceeding without arrest or attachment of property it would be in accordance with the doctrine of the Indiana courts since there is the added feature of special damage to reputation, *Lockenour* v. *Sides*, 57 Ind. 360. However, the case has one peculiarity in that the judicial proceeding does not purport to adjudicate or conclude the mental status of the person alleged to be insane, but merely declares that the person as fit to be admitted to one of the hospitals, which is the only purpose for which the statute was enacted, *Naanes* v. *State*, 143 Ind. 299. The same case arose in California

under a very similar statute where the recovery was allowed even after the plaintiff had been a resident at the asylum, *Kellog* v. *Cochran,* 87 Cal. 192. These cases involving a statutory proceeding, though very rare, raise an interesting inquiry—from an entirely different angle—into the requisite nature of the judicial proceeding. While the opinions have said nothing about the ultimate nature of the judicial proceedings as regards the contested rights of the party maliciously sued, yet it is evident from an examination of the cases that the purpose of the suit in every instance was to impair some valuable right enjoyed by the defendant; rights *in rem* were always involved. In the principal case, no right which the plaintiff desired to preserve was at stake in the malicious suit: the right to reside in the asylum was, no doubt, far from his desire; nor does the statute authorize a finding by the justice of the peace to force his residence there. It is clear that the plaintiff could not prevail if the proceedings instituted were extra-judicial, *Turpin* v. *Remy,* 3 Blackf. 210. To keep the case within the rule, therefore, the court lays down a broad definition of judicial proceeding: a proceeding by a regularly constituted court of justice clothed with authority to hear and determine a question of fact, or a mixed question of law and fact, upon evidence written or oral, to be produced before such court, and thereupon to enter a decision affecting the material rights or interests of one or more persons or bodies corporate. The court goes on the ground that the gravamen of the action for malicious prosecution is the fact that the plaintiff "has been improperly made the subject of legal process to his damage." It would seem that the holding of the court works best to prevent the use of the judicial machinery for malicious purposes, which is, after all, the real reason for allowing the action.

NEGLIGENCE — LICENSEE OR INVITEE — PERSON ACCOMPANYING PURCHASER INTO STORE.—Two boys entered a grocery store, only one of whom intended to purchase. As a clerk opened a case of goods the other, (the plaintiff), was blinded in one eye by a flying piece of metal. He brought an action and was nonsuited in the trial court. *Held,* nonsuit proper; the plaintiff was a mere licensee, not an invitee, and only entitled to protection against willful injury. *Fleckenstein* v. *Great Atlantic and Pacific Tea Co.,* (N. J., 1917), 102 Atl. 700.

The fundamental difference between a licensee and invitee is the purpose with which one is on the other's premises. In the words of KNOWLTON, J., "* * * to come under an implied invitation as distinguished from a mere licensee, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant." *Plummer* v. *Dill,* 156 Mass. 426. In that case the plaintiff went on defendant's premises in search of a servant and was held to be only a licensee. See also *Indermaur* v. *Dames,* 14 L. T. R. (N. S.) 484. A woman, who because she was of the same race and religion as a dead man, came to the house he had occupied

to attend his wake, she was held but a license. *Hart* v. *Cole*, 156 Mass. 475. But where a boy accompanied his father to inspect a house that the latter contemplated renting, he was an invitee, since it was for the landowner's interest that members of the plaintiff's family inspect the house to aid the prospective tenant in his decision as to renting it, *Kalus* v. *Bass*, 122 Md. 467. And a woman was an invitee who accompanied her husband to a lumber yard to aid in the purchase for her of an ironing board. *Davis* v. *Ferris*, 53 N. Y. Supp. 571. In the principal case the plaintiff was no more than a licensee, a volunteer, although his companion was an invitee. This separation into different characters of two persons who come together, stay together, and go together, is analogous to the considering of one man as an invitee as to part of the occupant's premises and a licensee as to the rest. In *Herzog* v. *Hemphill*, 7 Cal. App. 116, the plaintiff entered defendant's tamale stand to buy tamales. Here he was an invitee. But when he went into the cellar for purposes of nature he was a licensee as to that portion of the premises and had only the rights of such.

PRINCIPAL AND AGENT—TRAVELING SALESMAN—AUTHORITY TO TAKE ORDERS.—The traveling salesman of a vendor took an order from the trustee of a saloon attached by creditors, agreeing that his principal should come in *pro rata* with the other creditors and that the vendee was to be bound only as trustee and not personally. The principal shipped without knowledge of the restricted liability stipulated for. *Held*, three justices dissenting, it was within the scope of the agent's authority to take an order with such an agreement, and the principal was bound by it. *Rothchild Bros.* v. *Kennedy*, (Ore., 1917), 169 Pac. 102.

The general rule of law as to the extent of a drummer's authority can be simply stated. In common with other selling agents, he has power within the limits openly fixed by the principal or determined by usage and custom, to agree upon the terms of the sale and do what is incidentally necessary to effectuate it. *Daylight Burner Co.* v. *Odlin*, 51 N. H. 56; *Blaess* v. *Nichols*, 115 Ia. 373; *Leach* v. *Beardslee*, 22 Conn. 404; STORY OF AGENCY, (Ed 8), sec. 106; TIFFANY ON AGENCY, sec. 48 *et seq.* The terms he makes must be usual and reasonable, not extraordinary. *Beck* v. *Freund*, 117 N. Y. Supp. 193; *Putnam & Co.* v. *French*, 53 Vt. 402; MECHEM ON AGENCY (Ed. 4), sec. 362. But the application of the rule to particular cases in which the agent has made an agreement with the vendee often brings the question of custom and reasonableness squarely before the court. This has led to the laying down of several doctrines. An agent may not sell at a price so far below the market price as to put the vendee on inquiry as to his authority. *Mabray* v. *Kelly-Goodfellow Shoe Co.*, 73 Mo. App. 1; *Brown Grocery Co.* v. *Becket*, 22 Ky. Law Rep. 393. He cannot bind the principal by secret rebate agreements. *Tollerton & Warfield Co.* v. *Gilruth*, 21 S. Dak. 320; *Taylor Mfg. Co.* v. *Brown*, 4 Tex. Ct. of App., Civ. C. 19. He cannot take satisfaction of his personal obligation to the vendee as payment. *Shoninger* v. *Peabody*, 59 Conn. 588. He cannot make warranties not recognized by

usage or authorized by his principal. *Holcomb* v. *Cable Co.*, 119 Ga. 466. Though he may do so within the customary limits of his line of business. *Blaess* v. *Nichols, supra.* The principal case comes close to infringing on many of the doctrines here laid down, and is at swords' points with other decisions in the salesman field. Traveling men almost universally sell on commission and it is to their interest to enhance their sales as much as possible. In *Lindow* v. *Cohn,* 5 Cal. App. 388, a drummer agreed to take as part payment, previously sold goods, which had not come up to warranty. His principal shipped the goods, in ignorance of the agreement, and was allowed to recover the whole purchase price. In *Friedman & Sons* v. *Kelly,* 126 Mo. App. 279, the traveler agreed that his firm would take back all goods unsold at the end of the season. His principal was not bound by the agreement. In *Ide* v. *Brody,* 156 Ill. App. 479, the drummer was willing, in order to make a sale, that his firm allow a return of any goods not satisfactory which should in the future be sold to this vendee. The principal was allowed to repudiate the agreement. The majority opinion in the principal case goes on the grounds that the subsequent shipment by the principal is an acceptance of all the terms as made by the agent, since it was the latter's duty to notify his principal of those terms and such knowledge will be imputed. This seems to beg the entire question of the agent's authority, since knowledge of an agent's acts can be imputed to the principal only when the agent is acting within the scope of his authority, and not when he knows that he is overstepping the bounds of his powers. See *Clement* v. *Young-McShea Amusement Co.,* 70 N. J. Eq. 677. The doctrine of the principal case appears to go further than is necessary for the protection of purchasers from drummers, and to put in the hands of traveling salesmen more power than is desirable.

WAR—MILITARY AUTHORITIES—JURISDICTION TO TRY OFFENSE.—A soldier, after declaration that a state of war existed between the United States and Germany, killed a policeman of a Kentucky city. He was turned over to the civil authorities. His captain and major consented on the same day that the civil authorities should proceed with the case. A writ of *habeas corpus* was sued out for his surrender to the military authorities, the commanding officer of the brigade asserting prior jurisdiction in the courts-martial. *Held,* that the military authorities had superior jurisdiction of the offense and that the hasty consent of the soldier's captain and major was not a waiver of jurisdiction as against the commanding officer of his brigade. *Ex parte King,* (1917), 246 Fed. 868.

This case is the first decision handed down on the prior jurisdiction of the military courts over a soldier committing a homicide during time of war, although there are some *dicta* to the same effect in the cases bearing on the question. The present decision comes under the War Act, Aug. 29, 1916, U. S. Compiled Stat. 1916, Sec. 2308-a which takes place of Section 1342 U. S. Rev. Stat. Previously, under Sec. 1342 a soldier of the United States could be court-martialed in time of peace for offenses committed by him in

violation of the criminal laws of a state or of the United States. He could be tried by a general court-martial for a capital crime as a disorder or neglect prejudicial to good order and military discipline, even though he had been acquitted for murder by the civil authorities. *In re Stubbs*, 133 Fed. 1012. And a trial and acquital by a court-martial is not a bar to a prosecution by the proper civil authorities. *U. S.* v. *Clark*, 31 Fed. 710, *In re Fair*, 100 Fed. 149. It will be noted this is not unconstitutional as the prisoner is prosecuted in each case for a different offense. But an acquital by a court-martial is a bar to subsequent prosecution in a civil court for the same acts constituting the *same* crime. The jurisdiction of the military courts is thus seen to be concurrent with the civil courts. *Grafton* v. *U. S.*, 206 U. S. 333, 11 Ann. Cas. 640; *Franklin* v. *U. S.*, 216 U. S. 559. In *Coleman* v. *Tennessee*, 97 U. S. 509, it was said that where an offense covered by this article was committed in time of war in enemy country, the military authorities have exclusive jurisdiction of the offense. "This position was based on principles of international law and not on an interpretation of the statute." *Ex Parte King* (*supra*). It was in that case Field, J., recognized the superior jurisdiction of the military authorities in a case like the present. Whatever may have been the law under the old articles, under the new ones the military authorities have the preference in the exercise of jurisdiction. The court intimates that the jurisdiction may even be exclusive. Most of the cases cited above were discussed by the court.

WILLS—ESTATE DEVISED—RULE IN SHELLEY'S CASE.—A will devised testators' land to their son-in-law and daughter, adding that after the daughter's death it was to be divided equally between said son-in-law and the heirs of the daughter's body. The daughter, who subsequently outlived her husband, had joined with him in a conveyance to the defendant. She is now dead and the plaintiff is her only heir-at-law. *Held*, that the rule in *Shelley's Case* applies in spite of previous North Carolina decisions rejecting its application where the limitation to the heirs is qualified by the words "equally to be divided," and the like, because here the qualifying words serve merely to separate the husband's estate from that of the heirs of the wife; that the statute enlarges a fee-tail into a fee simple and the defendant takes an indefeasible title under the conveyance. (Clark, C. J. and Brown, J. dissenting). *White* v. *Goodin*, (N. C., 1917), 94 S. E. 454.

It is noteworthy that the whole court unites in the belief that such words of division may remove the devise from the application of the rule, though they acknowledge that this position is exactly contrary to the holdings of the English courts, see *Jesson* v. *Wright*, 2 Bligh 1, wherein the device was worded in exactly the same language as here. Apparently they do not realize that it is also contrary to an acknowledgment of the validity of the rule, which we are told is not one of construction but of legal policy, *Perrin* v. *Blake*, 4 Burr. 2579. American courts however have not always felt constrained to follow the English decisions, particularly where a devise is in question, but have rather hesitated to defeat the testator's intent though he

attempted to effectuate it in defiance of established legal principles, *Ridgeway* v. *Lamphear,* 99 Ind. 251. Still other jurisdictions show an inclination to take advantage of the words of distribution to construe "heirs" as a word of purchase. *Fulton* v. *Harman,* 44 Md. 251.

WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT—"ARISING OUT OF EMPLOYMENT".—An employee of a master engaged in the business of repairing furnaces, while on his way to do a job of repairing, left the vehicle provided by his employer, to buy tobacco for personal use. In crossing the street to reach the tobacco store he was struck by an automobile and killed. In a proceeding by the widow and children to obtain an award of compensation under the Workmen's Compensation Act, *held,* two judges dissenting, there should be no award, the accident not having been one arising "in the course and out of the employment". *In re Betts,* (Ind. App., 1918), 118 N. E. 551.

Emphasis was laid chiefly upon the fact that as the deceased was exposed only to the same hazards on the street as any pedestrian, his employment could not be said to have any causal connection with the injury, hence the accident was not one arising "out of his employment". Among the cases chiefly relied upon for this conclusion are the English cases repudiated by the House of Lords in *Dennis* v. *J. A. White & Co.,* [1917], A. C. 479, commented upon in 16 MICH. L. REV. 179. See *Martin* v. *Lovibond & Sons,* [1914], 2 K. B. 227, where compensation was awarded for an injury received by a drayman in the street while returning to his team after getting a glass of beer.